BOARD OF PATENT APPEALS AND INTERFERENCES
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants	:	Philip M. Ginsberg		
Application No.	:	09/955,594	Confirmation No. :	1177
Filed	:	September 5, 2001		
For	:	SYSTEMS AND METHODS FOR SHARING EXCESS PROFITS		
Group Art Unit	:	3694		
Examiner	:	Daniel L. Greene		

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Commissioner for Patents
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APPEAL BRIEF UNDER 37 C.F.R. § 41.37

This is an appeal from the decision of Examiner Daniel L. Greene, Group Art Unit 3694, in the final Office Action of February 4, 2009, rejecting claims 2, 4, 6, 7, 9, 10, 13-20, 22-29, and 31-33 (hereinafter the "Final Office Action"). A Notice of Appeal and a Pre-Appeal Conference Request were filed on June 30, 2009. A Pre-Appeal Conference Decision was mailed August 21, 2009.

The Commissioner is hereby authorized to charge the Appeal Brief filing fee as well as any additional fees which may be required, or credit any overpayment, to Deposit Account No. 50-3938.

I. REAL PARTY IN INTEREST

The real party in interest of the present application is BGC Partners, Inc., a corporation organized and existing under the laws of the State of Delaware, U.S.A., having a place of business at 499 Park Ave, New York, NY 10022.

II. RELATED APPEALS AND INTERFERENCES

There are no known related appeals or interferences.

III. STATUS OF CLAIMS

The following claims are pending and stand rejected in the present application:

Independent claims **2, 18, and 25**

Dependent claims **4, 6, 7, 9, 10, 13-17, 19, 20, 22-24, 26-29, and 31-33**

The following claims are being appealed:

Independent claims **2, and 18**

Dependent claims **4, 6, 7, 9, 10, 13-17, 19, 20, 22-24, 32, and 33**

The following claims have been cancelled: **1, 3, and 5**

The following claims have been withdrawn: **8, 11, 12, 21, and 30**

IV. STATUS OF AMENDMENTS

No amendments have been filed after the Final Office Action.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The presently claimed embodiment(s) generally relate to distributing profits among distributee participants in a market for a traded instrument of item.

Specifically, independent claim **2** is directed to a method comprising identifying, by a computer, a trade of a traded instrument or item that occurs at an outlier price deviating from a benchmark price and that involves a first distributee participant of a plurality of distributee participants in a market for the traded instrument or item. See, e.g., Specification, page 9, lines 8-32; Fig. 4. The benchmark price reflects at least one of a price and a range of prices at which the instrument or item would have traded in the absence of a market distortion. See, e.g., Specification, page 2, lines 13-25 and page 5, lines 6-31; Fig. 4. The method further comprises distributing at least a portion of the profits earned because of the deviation of the price of the outlier-price trade from the benchmark price to at least one second distributee participant of the plurality of distributee participants in the market for the traded instrument or item. See, e.g., Specification, page 10, line 18-27; Fig. 4.

Independent claim **18** is directed to a computer program embodied on a tangible medium. See, e.g., Specification, page 6; Fig. 1. The program is configured to instruct the computer to identify a trade of a traded instrument or item that occurred at an outlier price deviating from a benchmark price and that involves at least one first distributee participant of a plurality of distributee participants in a market for the traded instrument or item. See, e.g., Specification, page 9, lines 8-32; Fig. 4. The benchmark price reflects at least one of a price and a range of prices at which the instrument or item would have traded in the absence of a market distortion. See, e.g., Specification, page 2, lines 13-25 and page 5, lines 6-31; Fig. 4. The program is further configured to instruct the computer to generate a request that at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price be distributed to at least one second distributee participant of the plurality of distributee participants in the market for the traded instrument or item. See, e.g., Specification, page 10, line 18-27; Fig. 4.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The grounds for rejection to be reviewed on appeal are whether:

- Claims **2, 4, 6, 7, 9, 10, 13-17, 18, 19, 20, 22-24, 32, and 33** are unpatentable under 35 U.S.C. § 102(b) over Great Britain patent number GB 2,352,844 A to Beuttell (hereinafter "Beuttell").
- Claims **2, 4, 6, 7, 9, 10, 13-17, 18, 19, 20, 22-24, 32, and 33** are non-statutory subject matter under 35 U.S.C. § 101.
- Claims **2, 4, 6, 7, 9, 10, 13-17, 18, 19, 20, 22-24, 32, and 33** are unpatentable under 35 U.S.C. § 103(a) over The Clayton Antitrust Act of 1914 (hereinafter "CAA") in view of Energy and Electric State Laws and Regulations: Price Gouging (hereinafter, "State Laws") and Caffrey, "States Try to Deter Power Price Gouging" April 30, 2001 (hereinafter, "Caffrey").

VII. ARGUMENT

A. Summary of Argument

<u>No Prima Facie Showing of Anticipation</u>

The Final Office Action fails to make a *prima facie* case of anticipation under 35 USC 102(b). The Final Office Action fails to address the actual pending claims and instead addresses claims that were previously pending. The Final Office Action relies on a combination of Beuttel and a factual finding without any evidentiary support to make the 35 USC 102(b)rejection rendering the 35 USC 102(b) rejection improper. Moreover, the factual finding is a factual finding of the state of the art that may not be made using evidence without any evidentiary support. Even if the actual claims were addressed, and a factual finding without any evidentiary support could be made in a 35 USC 102(b) rejection, and the evidence without any evidentiary support was proper, the Final Office Action still fails to show that each and every claim limitation is taught or suggested by the prior art.

No Prima Facie Showing of Non-Statutory Subject Matter

The Final Office Action fails to make a *prima facie* showing that the claims are not statutory subject matter under 35 USC 101. The Final Office Action incorrectly applies the machine test to independent claim 2 and fails to inquire whether the transformation test is satisfied by independent claim 2. The Final Office Action also improperly applies tests for statutory subject matter that apply only to processes to the article of manufacture of matter claim of independent claim 18.

No Prima Facie Showing of Obviousness

The Final Office Action fails to make a *prima facie* showing of obviousness under 35 USC 103(a). The Final Office Action fails to address the actual pending claims and instead addresses claims that were previously pending. The Final Office Action makes factual findings without providing substantial evidence for support. Even if the actual claims were addressed and the factual findings were properly supported, the Final Office Action still fails to show that all claim limitations are taught or suggested by the prior art.

Improper Use of Inherency and Claims Not Addressed

The Final Office Action also relies upon inherency to reject some dependent claims without applying the legal standard for inherent disclosure. The Final Office Action also does not address some currently pending dependent claims but instead addresses previously pending versions of those claims. The Final Office Action also fails to address the limitations of some dependent claims at all.

B. Standard of Review

The Board, in deciding *ex parte* appeals, is required to adjudicate the legal issues independently, and is not to give deference to the Examiner. It is not Applicants' burden to establish "error" by the Examiner or to persuade the Board. Rather, if examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more, the Applicants are entitled to grant of the patent. In re Oetiker, 977 F.2d 1443, 1445 (Fed. Cir. 1992). The Board reviews the ultimate legal decisions made by the Examiner de novo. In re Kahn, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006). The Board reviews any findings of fact

made by the examiner to determine if substantial evidence exists to support the findings of fact. Id. Substantial evidence is something less than the weight of the evidence but more than a mere scintilla of evidence. Id.

C. There is No *Prima Facie* Showing of Anticipation

1. Legal Standard of Anticipation under 35 USC § 102(b)

If examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more, the Applicants are entitled to grant of the patent. In re Oetiker, 977 F.2d 1443, 1445 (Fed. Cir. 1992). The initial burden of presenting a *prima facie* case of unpatentability is upon the Examiner. In re Oetiker, 977 F.2d at 1445. If the examiner fails to establish a *prima facie* case of unpatentability, the rejection is improper and will be overturned. In re Rijckaert, 9 F.3d 1531, 1532 (Fed. Cir. 1993); In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988).

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628,631 (Fed. Cir. 1987). In any inquiry under § 102(a), (b) or (e) vis-à-vis a publication or patent, the publication or patent must expressly or inherently teach each and every element of the claim, arranged as in the claim. The only two types of disclosure that may be considered in an anticipation analysis are express disclosure and inherent disclosure. *Continental Can Co. v. Monsanto Co.*, 948 F.2d 1264, 1268, 20 USPQ2d 1746, 1749-50 (Fed. Cir. 1991); MPEP § 2112. Accordingly, "Official Notice" may be raised in *obviousness* contexts, but *never* anticipation contexts.

Substantial evidence must be provided in support of every finding of fact. Nothing removes the requirement for substantial evidence support mandated by 5 U.S.C. § 706. Dickinson v. Zurko, 527 U.S. 150, 144 L. Ed. 2d 143, 119 S. Ct. 1816 (1999). Substantial evidence is something less than the weight of the evidence but more than a mere scintilla of evidence. In re Kahn, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006).

The Office may *never* take Official Notice of facts that constitute the state of the art. In re Eynde, 480 F.2d 1364, 1370, 178 USPQ 470, 474 (CCPA 1973). Official Notice may not be used to "show specific knowledge of the prior art that may be peculiar to a particular art." In re Ahlert,

424 F.2d at 1027, 165 USPQ at 420-21. Official Notice may be used, if at all, to "supplement or clarify the teaching of a reference disclosure, perhaps to justify or explain a particular inference to be drawn from the reference teaching." Id. *Elaboration* or *explanation* of documents is nearly the *only* use that may be made of Official Notice, if any are proper at all, with respect to technological facts outside the arts that are in familiar, everyday use. *E.g.*, In re Pardo, 684 F.2d 912, 917, 214 USPQ 673, 677 (CCPA 1982), *quoting* Ahlert, 424 F.2d at 1091, 165 USPQ 420-21.

Inherency requires that extrinsic evidence makes it clear that the missing matter is necessarily present in the reference, and that it would be so recognized by persons of ordinary skill. In re Robertson, 169 F.3d 743, 49 USPQ2d 1949 (Fed. Cir. 1999). Probabilities or possibilities do not establish inherency. The mere fact that a certain thing may result from a given set of circumstances is not sufficient to show inherency. Scaltech Inc. v. Retec / Tetra LLC, 178 F.3d 1378, 1384, 51 U.S.P.Q.2D 1055 (Fed. Cir. 1999).

2. Background

The Final Office Action rejects claims 2, 4, 6, 7, 9, 10, 13-17, 18, 19, 20, 22-24, 32 and 33 under 35 U.S.C. § 102(b) as being allegedly unpatentable over Beuttell. The Final Office Action relies on evidence without any evidentiary support to make this rejection.

3. No *Prima Facie* Showing of Anticipation of Independent Claims 2 and 18

a. Summary

The Final Office Action does not address the pending claims, makes an improper 102 rejection that relies on evidence without any evidentiary support, improperly relies on evidence without any evidentiary support to make a factual finding of the state of the art, and fails to address each and every limitation of the pending claims. The Final Office Action therefore fails to make a *prima facie* showing of anticipation under 35 USC § 102(b).

b. The Final Office Action Does Not Address the Currently Pending Claims

SEPARATE ARGUMENT OF PATENTABLITY

In the rejection of independent claims 2 and 18 over Beuttell, the Final Office Action states that the claims are rejected under 35 USC § 102(b) over Beuttell for the same reasons stated in an Office Paper of August 15, 2007 (hereinafter, the "Prior Paper"). See, Final Office Action page 7.

The Prior Paper never discusses the above cited limitation. Rather, claims 2 and 18 were amended to their current form in an amendment by Applicants dated September 21, 2007 (The "Prior Amendment") after the Prior Paper and were reproduced in the same form again for the Examiner in an amendment dated November 12, 2008 (the "Latest Amendment").

Claim 2 at the time of the Prior Paper read, in part:

> by computer, identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price, the benchmark price being a price or range of prices at which the instrument or item would have traded in absence of market distortion, the identifying being based at least in part on monitoring prices at which trades of the instrument or item occur over a time interval, and
>
> distributing at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, to at least one of a plurality of distributee participants in a market for the traded instrument or item.

Currently pending claim 2 as amended by the Prior Amendment and reproduced in the Latest Amendment recites, in part:

> by computer, identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price, the benchmark price reflecting at least one of a price and a range of prices at which the instrument or item would have traded in absence of market distortion, *the trade involving at least one first distributee participant of a plurality of distributee participants in a market for the traded instrument or item*; and
>
> distributing at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, *to at least one second distributee participant of the plurality*

> *of distributee participants* in the market for the traded instrument or item

Claim 18 at the time of the Prior Paper read in part:

> identify a trade of a traded instrument or item that occurred at an outlier price deviating from a benchmark price, the benchmark price a price or range of prices at which the instrument or item would have traded in absence of market distortion, the identifying being based at least in part on monitoring prices at which trades of the instrument or item occur over a time interval, and
>
> generate a request that at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, be distributed to at least one of a plurality of distributee participants in a market for the traded instrument or item.

Currently pending claim 18 as amended by the Prior Amendment and reproduced in the Latest Amendment, recites, in part:

> identify a trade of a traded instrument or item that occurred at an outlier price deviating from a benchmark price, the benchmark price reflecting at least one of a price and a range of prices at which the instrument or item would have traded in absence of market distortion, *the trade involving at least one first distributee participant of a plurality of distributee participants* in a market for the traded instrument or item; and
>
> generate a request that at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, be distributed *to at least one second distributee participant of the plurality of distributee participants* in the market for the traded instrument or item.

Accordingly, the Final Office Action does not discuss the currently pending claim limitations that include a trade involving a *first distributee participant* and distributing at least a portion of profits earned from the trade to a *second distributee participant.* Neither the rejection under 35 USC § 102(b) in the Final Office Action nor the rejection under 35 USC § 102(b) in the Prior Paper discusses a first distributee participant and a second distributee participant. See Final Office Action page 7 and Prior Paper pages 5 and 6.

Therefore, by failing to address or even mention each and every currently pending claim limitation, the Final Office Action has failed to make a *prima facie* case of anticipation of

independent claim 2 or independent claim 18 under 35 USC § 102(b). Each of the remaining claims depends from at least one of independent claim 2 and independent claim 18 is the Final Office Action has failed to make a *prima facie* case of anticipation of these claims for at least similar reasons.

c. If the Final Office Action Addressed the Currently Pending Claims, the Final Office Action Improperly Relies on Evidence without Any Evidentiary Support

SEPARATE ARGUMENT OF PATENTABLITY

Assuming for the sake of argument that the Final Office Action addressed the currently pending claims, in response to arguments made by Applicants in the Latest Amendment regarding the rejection under 35 USC § 102(b) of claims 2 and 18 over Beuttell, the Final Office Action states:

> The process of distributing profits is considered to be what happens when a trader working for a trading firm enters a trade order that is accepted. That is, the trading FIRM receives the profits (and losses) from ALL of its employees (i.e. Traders) and distributes at least a portion of said profit in the form of a paycheck, a bonus or some other fashion. This is also known in the art as a commission.
>
> Commission noun 1 an instruction, command, or duty. 2 an order for something to be produced specially. 3 a group of people given official authority to do something. 4 a sum paid to an agent in a commercial transaction.

See, Final Office Action page 3. The Final Office Action makes no statement that any of the above cited finding of fact regarding the state of the art can be found in Beuttell. Particularly, the Final Office Action does not cite Beuttell or any other reference when discussing distributing profits, when discussing paychecks, when discussing bonuses, when discussing commissions, or when discussing any of the above quoted findings of fact regarding the state of the art. Because the Final Office Action provides no citation to Beuttell regarding the above findings of fact regarding the state of the art and because the above cited findings of fact regarding the state of the art cannot be found in Beuttell, the citation is evidence without any evidentiary support.

Because a single cited reference must teach or suggest each and every claim limitation to

make a legal 35 USC § 102(b) rejection and accordingly evidence without any evidentiary support cannot be used to legally reject a claim under 35 USC § 102(b), the Final Office Action fails to make a *prima facie* showing of anticipation under 35 USC § 102(b) by relying on evidence without any evidentiary support to make the 35 USC § 102(b) rejection of independent claim 2 and independent claim 18. Each of the remaining claims depends from at least one of independent claim 2 and independent claim 18 is the Final Office Action has failed to make a *prima facie* case of anticipation of these claims for at least similar reasons.

d. If the Final Office Action Addressed the Currently Pending Claims and if Evidence without Any Evidentiary Support Could be Relied Upon, the Particular Evidence without Any Evidentiary Support is Improper

SEPARATE ARGUMENT OF PATENTABLITY

Assuming for the sake of argument that the Final Office Action addressed the currently pending claims and that evidence without any evidentiary support could be use to make an anticipation rejection, the Final Office Action improperly uses evidence without any evidentiary support to make a factual finding of the state of the art. In particular, the Final Office Action makes statements regarding distributing profits, paychecks, bonuses, and commissions that are not discussed in Beuttell, makes no suggestion that these statements are discussed in Beuttell, provides what appears to be a definition without citation to a dictionary or other reference, and provides no reference at all to support these factual findings of the state of the art. The use of evidence without any evidentiary support amounts to an Official Notice.

Because Official Notice may be used only to elaborate or explain cited prior art and not as a finding of fact regarding the state of the art, and because substantial evidence must be provided for all findings of fact, the Official Notice would be improper even if it could be made in the context of a 35 USC § 102(b) or were made in a 35 USC § 103 rejection. Therefore, no *prima facie* showing of any rejection of independent claim 2 and independent claim 18 over the combination of Beuttell and the Official Notice is made by the Final Office Action. Each of the remaining claims depends from at least one of independent claim 2 and independent claim 18 and the Final Office Action has failed to make a *prima facie* case of anticipation of these claims for at least similar reasons.

e. If the Final Office Action Addressed the Currently Pending Claims, if Evidence without Any Evidentiary Support Could be Relied Upon, and if the Particular Evidence without Evidentiary Support Was Proper, the Final Office Action Still Fails to Address Each and Every Element of the Claims

Assuming for the sake of this argument that the Final Office Action addressed the currently pending claims, that evidence without any evidentiary support could be used in an anticipation rejection, and that the particular evidence without any evidentiary support was proper, the combination of Beuttell and the evidence without any evidentiary support fails to teach or suggest each and every limitation of the independent claim 2 and independent claim 18.

Independent claim 2 recites, in part:

> "the *trade involving at least one* ***first distributee participant*** of a plurality of distributee participants in a market for the traded instrument or item; and
>
> "*distributing at least a portion of* ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price,*** *to at least* ***one second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item."

Independent claim 18 includes similar limitations that recite:

> the *trade involving at least one* ***first distributee participant*** of a plurality of distributee participants in a market for the traded instrument or item; and
>
> "generate a request that *at least a portion of* ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price,*** *be distributed to at least one* ***second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item."

The combination of Beuttell and the evidence without any evidentiary support does not teach or suggest such limitations.

The Final Office Action cites no references in making the rejection, but relies on an argument made in the Prior Paper. See Final Office Action page 7. As discussed above, the argument in the Prior Paper, which does not address the actual pending limitations but addresses the previously pending limitations that included a reference to a distribution of at least a portion of profits, cites the abstract, fig. 25, page 2, page 2 lines 4-18, page 3, lines 5-13, page 4, lines 5-

18, page 9, lines 16 and 17, page 10 lines 31 to page 11 line 30, and page 45, lines 19-35 of Beuttell to address the prior pending limitation. See Prior Paper page 6. Each of these citations is described in turn.

Beuttell discusses a system for tracking the price movements of commodities and providing a display of a volume of transactions in a time period. See Beuttell abstract. Beuttell provides an example flowchart that may be used to make a display of information to a trader. See Beuttell fig. 25. Beuttell discusses that a benchmark of trade volumes may be generated based on trade activity. See Beuttell page 2, lines 4-18. Beuttell discusses that the volume benchmark may be proportional to daily traded volume over a preceding period. See Beuttell page 3, lines 5-13. Beuttell discusses that a computer may be used to perform calculations to generate the volume benchmark. See Beuttell page 4, lines 5-18. Beuttell discusses that a computer is essential to the tracking and calculating of the quantity of trades made in Beuttell. See Beuttell page 9, lines 16 and 17. Beuttell discusses that trades may be different colors in a display based on the price of the trade. See Beuttell page 10, lines 31 to page 11, line 30. Beuttell discusses that information shown to a trader may be coded to allow the trader to respond to more urgent changes in a market before less urgent changes. See Beuttell page 45, lines 19-35.

It is clear from the review of these cited sections and the remainder of Beuttell that Beuttell makes no teaching or suggestions of "*distributing at least a portion of* ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price****, to at least one* ***second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item." In particular, Beuttell makes no teaching or suggestion of a *distribution of profit from a trade involving a* ***first distributee participant*** *to* ***a second distributee participant*** or distributing ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price***.

Moreover, evidence without any evidentiary support (See Final Office Action page 4) that discusses providing paychecks, bonuses, and commissions to employees, does not teach or suggest "*distributing at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, to at least one* ***second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item."

Particularly, the recited limitation is not taught or suggested by commissions. Commissions are paid by a party to a transaction to an agent for entering into the transaction.

Commissions are given to the sales person responsible for the entry into the transaction and not to any second sales person. Accordingly, "*distributing at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, to at least one* ***second distributee participant***" is not taught or suggested by a commission that only involves a payment to a single sales person (i.e., the sales person involved in the sale) and no second sales person at all.

The recited limitation is not taught or suggested by paychecks. Paychecks are provided to an employee based on salary agreements, hourly wage agreements, or performance agreements for that employee. Some paychecks may include commissions, which are discussed above. Paychecks are given to the employee that satisfies the agreement with the employer and not any second person. Accordingly, "*distributing at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, to at least one* ***second distributee participant***" is not taught or suggested by a paycheck that only involves a payment to a single person (i.e., the employee that fulfills an employee agreement) and no second person at all.

Bonus payments are provided to employees as a reward or incentive for performance of the respective employee's duties. Bonuses generally act similarly to commissions but may not be based on a per sale basis, but rather are generally provided at the end of a year or end of a large project. Bonuses are given to an employee that performs his or her respective duties and not to any second person. Accordingly, "*distributing at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, to at least one* ***second distributee participant***" is not taught or suggested by a bonus that only involves a payment to a single person (i.e., the employee that fulfills his or her duties) and no second person at all.

Moreover, there is no teaching or suggestion in the evidence without any evidentiary support regarding commissions, paychecks, and bonuses related in any way to distributing "**profits earned because of the** ***deviation of the price of the outlier-price trade from the benchmark price.***" The Final Office Action makes no statement to the contrary.

It is clear from the review of the evidence without any evidentiary support that the evidence without any evidentiary support makes no teaching or suggestions of "*distributing at least a portion of* ***profits earned because of the deviation of the price of the outlier-price trade***

from the benchmark price, *to at least one* ***second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item." In particular, the evidence without any evidentiary support makes no teaching or suggestion of a *distribution of profit from a trade involving a* ***first distributee participant*** *to* ***a second distributee participant*** or distributing ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price***.

Accordingly, the combination of Beuttell and the evidence without any evidentiary support fails to teach or suggest "*distributing at least a portion of* ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price,*** *to at least* ***one second distributee participant."*** Therefore, no *prima facie* showing of any rejection of independent claim 2 is made over the combination of Beuttell and the evidence without any evidentiary support. As described above, independent claim 18 includes similar limitations as independent claim 2 and therefore no *prima facie* showing of any rejection of independent claim 18 is made over the combination of Beuttell and the evidence without any evidentiary support for similar reasons. Each of the remaining claims depends from at least one of independent claim 2 and independent claim 18 and the Final Office Action has failed to make a *prima facie* case for any rejection over the combination of Beuttell and the evidence without any evidentiary support for at least similar reasons.

4. No *Prima Facie* Showing of Anticipation of Dependent Claim 15

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 15 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 15. Further, although the Final Office Action does not cite any references to reject dependent claim 15 under 35 USC 102(b) over the combination of Beuttell and the evidence without any evidentiary support, as discussed above, or mention any of the limitations of dependent claim 15, the Final Office Action state that claim 15 is rejected under 35 USC § 102(b) over Beuttell for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

The Prior Paper never discusses the limitation of currently pending claim 15. Rather, dependent claim 15 was amended to the current form in the Prior Amendment and reproduced in the Latest Amendment.

Claim 15 at the time of the Prior Paper read, in part:

> the monitoring further comprising monitoring a plurality of trading prices.

Currently pending claim 15 as amended by the Prior Amendment and reproduced in the Latest Amendment recites, in part:

> the monitoring comprises sampling the trading prices *at pre-determined intervals.*

Accordingly, the Final Office Action and the Prior Paper fail to address or even mention the limitations of dependent claim 15. Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claim 15 over the combination of Beuttell and the evidence without any evidentiary support.

5. No *Prima Facie* Showing of Anticipation of Dependant Claim 16

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 16 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 16. Further, although the Final Office Action does not cite any references to reject dependent claim 16 under 35 USC 102(b) over the combination of Beuttell and the evidence without any evidentiary support, as discussed above, or mention any of the limitations of dependent claim 16, the Final Office Action state that claim 16 is rejected under 35 USC § 102(b) over Beuttell for the same reasons stated in the Prior Paper. See, Final Office Action page 8.

Claim 16 recites, in part:

> monitoring for prices remaining stable within a relatively small percentage range.

The Prior Paper rejects claims 16 stating that this limitation is inherent in Beuttell. See Prior Paper page 8. However, the Prior Paper does not comply with the requirements of inherency by providing extrinsic evidence to make it clear that the missing matter is necessarily

present in the reference. Rather, the Prior Paper only shows that the limitation is possible and accordingly fails to show that the limitation is inherent in the teaching of Beuttell.

Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claim 16 over the combination of Beuttell and the evidence without any evidentiary support.

6. No *Prima Facie* Showing of Anticipation of Dependant Claim 17 and 24

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 17 depends from independent claim 2 and dependent claim 24 depends from independent claim 18 and the arguments above regarding independent claim 2 and 18 apply to dependent claims 17 and 24 respectively. Further, although the Final Office Action does not cite any references to reject dependent claims 17 and 24 under 35 USC 102(b) over the combination of Beuttell and the evidence without any evidentiary support, as discussed above, or mention any of the limitations of dependent claim 17 and 24, the Final Office Action state that claims 17 and 24 are rejected under 35 USC § 102(b) over Beuttell for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

Dependent claim 17 recites "the trading prices include prices for trades *occurring after the outlier-price trade*." Dependent claim 23 recites "the prices monitored include prices for trades occurring *after the outlier-price trade*." Neither Beuttell nor the evidence without any evidentiary support makes any mention of basing a distribution of profits for a trade on a price of trades that occur after the trade.

The Prior Paper rejects claims 17 stating that this limitation is inherent in Beuttell. See Prior Paper page 8. However, the Prior Paper does not comply with the requirements of inherency by providing extrinsic evidence to make it clear that the missing matter is necessarily present in the reference. Rather, the Prior Paper only shows that the limitation is possible and accordingly fails to show that the limitation is inherent in the teaching of Beuttell.

Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claims 17 and 23 over the combination of Beuttell and the evidence without any evidentiary support.

7. No *Prima Facie* Showing of Anticipation of Dependent Claim 32

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 31 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 32. Further, although the Final Office Action does not cite any references to reject dependent claim 32 under 35 USC 102(b) over the combination of Beuttell and the evidence without any evidentiary support, as discussed above, or mention any of the limitations of dependent claim 31, the Final Office Action state that claim 32 is rejected under 35 USC § 102(b) over Beuttell for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

The Prior Paper never discusses the limitation of currently pending claim 32. Rather, dependent claim 32 was amended to the current form in the Prior Amendment and reproduced in the Latest Amendment.

Claim 32 at the time of the Prior Paper read:

> The method of claim 25, wherein the prices monitored to determine a benchmark price include prices for trades occurring after the outlier-price trade.

Currently pending claim 32 as amended by the Prior Amendment and reproduced in the Latest Amendment recites, in part:

> The method of claim 2, further comprising distributing the at least the portion of the profits attributable to the deviation to the at least one second distributee participant of the plurality of distributee participants based at least in part on a proportion of market share attributable to the at least one second distributee market participant.

Moreover, the Prior Paper rejects claim 32 stating that it is inherent in Beuttell. However, the Prior Paper does not comply with the requirements of inherency by providing extrinsic evidence to make it clear that the missing matter is necessarily present in the reference.

Accordingly, the Final Office Action and the Prior Paper fail to address or even mention the limitations of dependent claim 32 and improperly uses inherency in the rejection that is made. Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claim 32 over the combination of Beuttell and the evidence without any evidentiary support.

8. No *Prima Facie* Showing of Anticipation of Dependent Claim 33

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 33 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 33. Further, although the Final Office Action does not cite any references to reject dependent claim 33 under 35 USC 102(b) over the combination of Beuttell and the evidence without any evidentiary support, as discussed above, or mention any of the limitations of dependent claim 33, the Final Office Action state that claim 33 is rejected under 35 USC § 102(b) over Beuttell for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

The Prior Paper never discusses the limitation of previously pending claim 33 but only makes a broad statement that claim 33 is rejected over Beuttell. See Prior Paper page 5. Moreover, dependent claim 33 was amended to the current form in the Prior Amendment and reproduced in the Latest Amendment.

Claim 33 at the time of the Prior Paper read:

> The method of claim 2, the monitoring further comprising monitoring a plurality of trading prices, the monitored instruments or items including at least electricity, the monitoring of prices comprising sampling the trading price at pre-determined intervals, and maintaining a running period of the samples falling within a range, to determine a mode among the samples of a running period.

Currently pending claim 33 as amended by the Prior Amendment and reproduced in the Latest Amendment recites:

> The method of claim 6, wherein the monitoring further comprising monitoring a plurality of trading prices, wherein the instruments or items including at least electricity, wherein the monitoring of prices comprise sampling the plurality of trading price at pre-determined intervals, and wherein the method further comprising maintaining a running period of the sampled trading prices falling within a range, to determine a mode among the samples of a running period the mode corresponding to the benchmark price.

Accordingly, the Final Office Action and the Prior Paper fail to address or even mention the limitations of current or previously pending dependent claim 33. Therefore, the Final Office

Action fails to make a *prima facie* case for the rejection of claim 33 over the combination of Beuttell and the evidence without any evidentiary support.

9. No *Prima Facie* Showing of Anticipation of Dependent Claims 20, 24, and 33

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claims 20, 24, and 33 depend from a respective one of independent claims 2 and 18 and the arguments above regarding the respective one of independent claims 2 and 18 apply to dependent claims 20, 24, and 33. Further, although the Final Office Action does not cite any references to reject dependent claims 20, 24, and 33 under 35 USC § 102 over the combination of Beuttell and the evidence without any evidentiary support, as discussed above, or mention any of the limitations of dependent claims 20, 24, and 33, the Final Office Action state that claims 20, 24, and 33 are rejected under 35 USC § 102 for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

However, the Prior Paper never even mentions any limitations of any of claims 20, 24, and 33, but instead only makes a broad statement about all pending claims being rejected under 35 USC § 102. See Prior Paper page 5. Accordingly, by failing to mention even a single limitation of any of claims 20, 24, and 33 the Prior Paper failed to examine these claims, and, the Final Office Action, by incorporating the Prior Paper also failed to examine these claims.

Therefore, because the Final Office Action failed to make any examination of claims 20, 24, and 33, the Final Office Action fails to make a *prima facie* case for the rejection of claims 20, 24, and 33 over the combination of Beuttell and the evidence without any evidentiary support under 35 USC § 102.

D. There is No *Prima Facie* Showing of Non-Statutory Subject Matter

1. Legal Standard for Non-Statutory Subject Matter

If examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the applicant is entitled to grant of the patent. In re Oetiker, 977 F.2d 1443, 1445 (Fed. Cir. 1992). The initial burden of presenting a *prima facie* case of unpatentability is

upon the examiner. In re Oetiker, 977 F.2d at 1445. If the examiner fails to establish a *prima facie* case of unpatentability, the rejection is improper and will be overturned. In re Rijckaert, 9 F.3d 1531, 1532 (Fed. Cir. 1993); In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988).

Patentable subject matter under the Patent Act of 1952 is extremely broad. *In re* Comiskey, 499 F.3d 1365, 1375 (Fed. Cir. 2007). Under 35 U.S.C.S. § 101, there are four categories of patent-eligible subject matter: processes, machines, manufactures, and compositions of matter. *In re* Bilski, 545 F.3d 943, 952 (Fed.Cir. 2008), Prometheus Laboratories, Inc. v. Mayo Collaborative Services, 2009 WL 2950232, 4 C.A. Fed. (Cal.), 2009. Given the breadth of the categories listed in 35 U.S.C.S. § 101, it is not surprising that the legislative history of the 1952 Act noted that Congress intended statutory subject matter to include anything under the sun that is made by man. *In re* Comiskey at 1375.

The United States Supreme Court has declared that while a claim drawn to a fundamental principle is unpatentable, an application of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection. In re Bilski at 953. While a scientific truth, or the mathematical expression of it, is not a patentable invention, a novel and useful structure created with the aid of knowledge of scientific truth may be. *Id.* Thus, when a claim containing a mathematical formula implements or applies that formula in a structure or process which, when considered as a whole, is performing a function which the patent laws were designed to protect, then the claim satisfies the requirements of 35 U.S.C. § 101. *Id.* at 959.

The Federal Circuit, in In re Bilski established two tests for whether a process is patentable subject matter, the machine test: is the process tied to a particular machine, and the transformation test: does the process transform an article into a different state or thing. The Board found in Dickerson that a process that includes a step of outputting by a computer satisfies the machine test of In re Bilski and is patentable subject matter and that program code stored on a recordable medium is an article of manufacture and therefore is patentable subject without need to apply the tests from In re Bilski. Ex Parte Dickerson Appeal 2009-001172 (*BPAI* 2009).

The Federal Circuit stated that an act of determining metabolite levels in a process claim renders the claim patentable subject matter by satisfying the transformation test because determining "necessarily involves a transformation, for those levels cannot be determined by mere inspection" Prometheus Laboratories, Inc. v. Mayo Collaborative Services 2009 WL

2950232, 9 (C.A. Fed. (Cal., 2009). The Federal Circuit stated that an act of administering a drug to a human body in a process claim transforms the human body and renders the claim patentable subject matter by satisfying the transformation test because "the drugs do not pass through the body untouched without affecting it." Id At 8.

2. Background

Claim 2, 4, 6, 7, 9, 10, 13-20, 22-29, and 31-33 under 35 U.S.C. § 101 were rejected as allegedly being directed to non-statutory subject matter.

3. Independent Claim 2 Satisfies Both the Machine and Transformation Test

SEPARATE ARGUMENT OF PATENTABLITY

The Final Office Action states that claim 2 is not tied to a particular machine and does not transform an article into a different state or thing. See Final Office Action, page 6. The Final Office Action references a section of the specification to support the rejections under 35 U.S.C. § 101. However, Applicants respectfully note that it is the claims, rather than the specification, that define the subject matter for which a patent is sought. The specification describes several varied embodiments, but the claims recite specific embodiments that explicitly satisfy both the machine and transformation tests of Bilski. Further, the Final Office Action fails to address the transformation test at all.

Independent claim 2 is directed to a respective process that includes actions performed by a particular machine as specifically recited in the claims. In particular, independent claim 2 specifically recites, in part: "by *computer*, identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price" Accordingly, the process is tied to a particular machine: the recited computer. Therefore, independent claim 2 satisfies the particular machine test established in Bilski.

Moreover, the Final Office Action fails to inquire whether independent claim 2 satisfies the transformation test. Independent claim 2 transforms an article, thereby satisfying both prongs of the Bilski test for patentable subject matter even though satisfying a single prong is sufficient to be considered statutory subject matter. Specifically, independent claim 2 transforms

an indication of a trade into a distribution of profits related to that trade. Therefore, independent claim 2 satisfies the transformation test established in Bilski.

Further, an identification by a computer transforms an article, i.e., the computer in a state without the identification, into another state or thing, i.e., the computer in a state in which the identification is made. As in Prometheus, in which a drug injection transformed a human, here, an identification causes a change in electronic circuits that make up the computer, magnetic storage on which data may be stored for the computer, and/or any other components of the computer used to make the identification. Therefore, claim 2 is patentable subject matter that satisfies the transformation test of Bilski.

Furthermore, because identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price, cannot be done by mere inspection of a trade alone, identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price is a transformation that satisfies the transformation test of Bilski. In particular, identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price includes reference to a benchmark price that is not determined by mere inspection f the trade identified. Therefore, as in Prometheus in which determining the levels of metabolite was a transformation satisfying the transformation test of Bilski, so too does identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price satisfy the transformation test of Bilski.

Therefore, by failing to inquire whether the transformation test is satisfied and improperly applying the machine test, the Final Office Action fails to make a *prima facie* showing that independent claim 2 is not statutory subject matter. Because independent claim 2 satisfies both the machine and transformation tests of In re Bilski, the claim is statutory subject matter. Claims 4, 6, 7, 9, 10, 13-17, 32 and 33 each depend from independent claim 2 and are statutory subject matter for at least similar reasons.

4. Independent Claim 13 Satisfies the Machine Test of Bilski

SEPARATE ARGUMENT OF PATENTABLITY

The Final Office Action states that claim 13 is not tied to a particular machine and does not transform an article into a different state or thing. See Final Office Action, page 6. Claim 13 recites, in part: "implementing the method in an *electronic trading platform*." Dependent claim 13 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 13. Further, an electronic trading platform is a particular machine. Therefore, claim 13 is explicitly tied to a particular machine and is statutory subject matter.

By failing to properly apply the machine test of In re Bilski, the Final Office Action has failed to make a *prima facie* showing that dependent claim 13 is not statutory subject matter.

5. Independent Claim 18 is an Article of Manufacture

SEPARATE ARGUMENT OF PATENTABLITY

The Final Office Action states that claim 18 is not tied to a particular machine and does not transform an article into a different state or thing therefore it is a process that is not statutory subject matter. See Final Office Action, page 6.

Independent claim 18 is not directed to a process at all, but is instead directed to an article of manufacture, namely "a computer program embodied on a tangible medium." Accordingly, the machine or transformation test does not apply to independent claim 18.

Therefore, the Final Office Action fails to make a *prima facie* showing that independent claim 18 is not statutory subject matter by incorrectly applying tests that have no relevance to the statutory class of independent claim 18. Claims 19-24 each depend from independent claim 18 and are statutory subject matter for at least similar reasons.

6. Even if the Bilski Tests Applied to Independent claim 18, Independent Claim 18 is Statutory Subject Matter

SEPARATE ARGUMENT OF PATENTABLITY

As discussed above, independent claim 18 is an article of manufacture, so the machine or transformation tests of Bilski do not apply. If independent claim 18 were a process, independent claim 18 would still satisfy the machine or transformation test and therefore would be statutory subject matter.

In particular, independent claim 18 specifically recites, in part: "A computer program embodied on a tangible medium, when executed by a computer, the program configured to instruct a computer." Accordingly, the independent claim 18 is tied to a particular machine: the recited computer. Therefore, independent claim 18 satisfies the particular machine test established in Bilski.

Moreover, the Final Office Action fails to inquire whether independent claim 18 satisfies the transformation test. Independent claim 18 transforms an article, thereby satisfying both prongs of the Bilski test for patentable subject matter even though satisfying a single prong is sufficient to be considered statutory subject matter. Specifically, independent claim 18 transforms an identified trade into a request to distribute profits. Therefore, independent claim 18 satisfies the transformation test established in Bilski.

Further, an identification by a computer transforms an article, i.e., the computer in a state without the identification, into another state or thing, i.e., the computer in a state in which the identification is made. As in Prometheus, in which a drug injection transformed a human, here, an identification causes a change in electronic circuits that make up the computer, magnetic storage on which data may be stored for the computer, and/or any other components of the computer used to make the identification. Therefore, claim 18 is patentable subject matter that satisfies the transformation test of Bilski.

Furthermore, because identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price, cannot be done by mere inspection of a trade alone, identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price is a transformation that satisfies the transformation test of Bilski. In particular, identifying a trade of a traded instrument or item occurring at an outlier price

deviating from a benchmark price includes reference to a benchmark price that is not determined by mere inspection f the trade identified. Therefore, as in Prometheus in which determining the levels of metabolite was a transformation satisfying the transformation test of Bilski, so too does identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price satisfy the transformation test of Bilski.

Therefore, even if the Bilski tests applied to independent claim 18, by failing to inquire whether the transformation test is satisfied and improperly applying the machine test, the Final Office Action fails to make a *prima facie* showing that independent claim 18 is not statutory subject matter. Because independent claim 18 satisfies both the machine and transformation tests of In re Bilski, the claim is statutory subject matter. Claims 19-24 each depend from independent claim 18 and are statutory subject matter for at least similar reasons.

E. There is No *Prima Facie* Showing of Obviousness

1. Legal Standard for Obviousness under 35 USC § 103(a)

If examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the applicant is entitled to grant of the patent. In re Oetiker, 977 F.2d 1443, 1445 (Fed. Cir. 1992). The initial burden of presenting a *prima facie* case of obviousness is upon the examiner. In re Oetiker, 977 F.2d at 1445. If the examiner fails to establish a *prima facie* case of obviousness, the rejection is improper and will be overturned. In re Rijckaert, 9 F.3d 1531, 1532 (Fed. Cir. 1993); In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988).

To reject claims under 35 U.S.C. § 103, an examiner must show an unrebutted *prima facie* case of obviousness. In re Rouffet, 149 F.3d 1350, 1355 (Fed. Cir. 1998). To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. In re Royka, 490 F.2d 981 (CCPA 1974).

Substantial evidence must be provided in support of every finding of fact. Nothing removes the requirement for substantial evidence support mandated by 5 U.S.C. § 706. Dickinson v. Zurko, 527 U.S. 150, 144 L. Ed. 2d 143, 119 S. Ct. 1816 (1999). Substantial evidence is something less than the weight of the evidence but more than a mere scintilla of evidence. In re Kahn, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006).

Inherency requires that extrinsic evidence makes it clear that the missing matter is necessarily present in the reference, and that it would be so recognized by persons of ordinary skill. In re Robertson, 169 F.3d 743, 49 USPQ2d 1949 (Fed. Cir. 1999). Probabilities or possibilities do not establish inherency. The mere fact that a certain thing may result from a given set of circumstances is not sufficient to show inherency. Scaltech Inc. v. Retec / Tetra LLC, 178 F.3d 1378, 1384, 51 U.S.P.Q.2D 1055 (Fed. Cir. 1999).

In order for an Final Office Action to properly reject a claim, 37 C.F.R. § 1.104(c)(2) states that when a reference is complex or shows or describes inventions other than that claimed by the applicant, the particular part relied on must be designated as nearly as practicable. The pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified.

2. Background

The Final Office Action rejected claims 2, 4, 6, 7, 9, 10, 13-20, 22-29, and 31-33 under 35 U.S.C. § 103(a) as being allegedly obvious over cited sections of The Clayton Antitrust Act of 1914 (hereinafter "CAA") in view of both cited sections of Energy and Electric Utilities State Laws and Regulations: Price Gouging (hereinafter "State Laws") and cited sections of Caffrey, "States Try to Deter Power Price Gouging" (hereinafter "Caffrey").

3. The Final Office Action Fails to Comply with 37 C.F.R. § 1.104(c)(2)

SEPARATE ARGUMENT OF PATENTABLITY

In rejecting claims 2, 4, 6, 7, 9, 10, 13-20, 22-29, and 32-33, the Examiner broadly points to CAA. The Final Office Action makes one citation to a minor section of CAA but appears to rely upon other not cited portions of CAA. CAA is an entire act of Congress. Acts of Congress are complex and CAA recites many elements not invented by Applicants. Therefore, the Final Office Action is required to cite particular sections relied upon.

The Final Office Action also broadly points to State Laws. State Laws is a summary of each the price gouging laws in the 50 states. The Final Office Action does not cite sections of

State Laws. State Laws is a complex reference that recites many elements not invented by Applicants. Therefore the Final Office Action is required to cite particular sections relied upon.

By citing the entirety of CAA and State Laws, the Final Office Action fails to comply with 37 C.F.R. § 1.104(c)(2) and is insufficient to raise any rejections using these references.

4. No ***Prima Facie*** Case of Obviousness of Independent Claims 2 and 18

a. Summary

The Final Office Action does not address the pending claims, fails to provide references that teach or suggest all limitations of the pending claims, and fails to provide substantial evidence in support of factual findings. The Final Office Action therefore fails to make a *prima facie* showing of obviousness under 35 USC § 103(a).

b. The Final Office Action Does Not Address the Currently Pending Claim

<u>SEPARATE ARGUMENT OF PATENTABLITY</u>

In the rejection of independent claims 2 and 18 over the combination of CAA, State Laws, and Caffrey, the Final Office Action states that the claims are rejected under 35 USC § 103(a) over the combination of CAA, State Laws, and Caffrey for the same reasons stated the Prior Paper. See Final Office Action page 7.

The Prior Paper never discusses the current limitations of claims 2 and 18. As discussed above, Claims 2 and 18 were amended in the Prior Amendment after the Prior Paper. Accordingly, the Prior Paper does not discuss the currently pending claim limitations that include a trade involving a *first distributee participant* and distributing at least a portion of profits earned from the trade to a *second distributee participant*.

Further, the Final Office Action, in discussing arguments made by Applicants in the Latest Amendment states: "the fine itself is the distribution to the at least one second participant." See Final Office Action pages 4 and 5. By discussing only a *second participant*, the Final Office Action again fails to address the actually pending claim limitation of a "*second* ***distributee*** *participant*" in both claims 2 and 18.

Accordingly, nowhere does the Final Office Action address the actually pending claim limitations of independent claims 2 and 18. Therefore, the rejection fails to make a *prima facie* case of obviousness for independent claims 2 and 18 under 35 USC § 103(a). Each of the remaining claims depends from at least one of independent claim 2 and independent claim 18 and the Final Office Action has failed to make a *prima facie* case for the rejection of these claims for at least similar reasons.

c. Even if the Final Office Action Addressed the Currently Pending Claim Limitations, The Combination of CAA, State Laws, and Caffrey Does Not Teach or Suggest the Limitations of Independent Claims 2 and 18

<u>SEPARATE ARGUMENT OF PATENTABLITY</u>

Assuming for the sake of this argument that the Final Office Action addressed the actually pending claims, the combination of CAA, State Laws and Caffrey fails to teach or suggest all the limitations of independent claim 2 and independent claim 18.

Independent claim 2 recites, in part:

> the *trade involving at least one* ***first distributee participant*** of a plurality of distributee participants in a market for the traded instrument or item; and
>
> *distributing at least a portion of* ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price****, to at least* ***one second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item.

Independent claim 18 includes similar limitations that recite:

> the *trade involving at least one* ***first distributee participant*** of a plurality of distributee participants in a market for the traded instrument or item; and
>
> generate a request that *at least a portion* ***of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price****, be distributed to at* ***least one second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item.

CAA is a set of laws designed to prevent price discrimination by a distributor of an item in commerce when such discrimination may promote a monopoly See CAA page 1. CAA makes

certain acts of discriminatory sales illegal such as selling to different customer at different prices to encourage a monopoly. See CAA Page 1. CAA identifies in section 15 (See CAA pages 4 to 6) that the government may impose fines and in section 26 (See CAA page 7) that individuals harmed by such discrimination may obtain injunctive relief and/or damages caused to them by the discrimination.

The Prior Paper cites only one section of CAA, page 3, section 13b. See Prior Paper page 10. Page 3, section 13b of CAA discusses that a cooperative agreement that distributes earnings to members of a cooperative in proportion to purchases or sales is not prohibited price discrimination that encourages a monopoly.

Neither this cited section nor the rest of CAA teach or suggest "*distributing at least a portion of* ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price***, *to at least* ***one second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item." CAA does not teach or suggest benchmarks prices or any distribution of profits among any market participants in any way. In fact, CAA makes no mention of profits at all.

Further, State Laws does not teach or suggest "*distributing at least a portion* ***of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price***, *to at least one* ***second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item." State Laws is a collection of information about state regulations regarding price gouging. State Laws specifically identifies each of the laws described in terms of a civil or criminal penalty provided by a respective state to prevent certain activity. Nowhere does State Laws teach or suggest that any portion of profits is distributed to any distributee market participants at all, but rather fines are collected by a respective state. Nowhere does State Laws teach or suggest any distribution of profits among any market participants in any way. In fact, State Laws makes no mention of profits at all.

Furthermore, Caffrey does not teach or suggest "*distributing at least a portion* ***of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price***, *to at least one* ***second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item." Caffrey is an article describing ways in which states attempted to prevent price gouging in the electrical power markets. See Caffrey abstract. Caffrey describes that California may fine or jail energy generators who sell energy at

unreasonable rates or collude with other generators to increase energy prices. See Caffrey page 2. Caffrey describes that New York may require energy producers to explain prices above a threshold and that such producers may be fined if the state does not find the explanation compelling. See Caffrey page 4. Any penalties in Caffrey are paid as fines to the states, not to any market distributee market participants at all. Nowhere does Caffrey teach or suggest any distribution of profits among any market participants in any way. In fact, Caffrey makes no mention of profits at all.

Not only do each of CAA, State Laws and Caffrey not disclose "*distributing at least a portion* ***of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price****, to at least one* ***second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item," they each teach away from the claimed embodiments. CAA, State Laws and Caffrey teach away from ***earned because of the deviation of the price of the outlier-price trade from the benchmark price*** by making the charging of excess or discriminatory prices illegal. For example, CAA teaches that sometimes charging increased prices is illegal. See CAA page 1 State Laws teaches that states may institute a penalty for selling at certain price conditions See State Laws, trigger event/prohibited acts column. Caffrey teaches that energy producers may be fined or jailed for charging high prices See Caffrey abstract and page 3.

Accordingly because none of CAA, State Laws, and Caffrey teaches or suggest the limitation of "*distributing at least a portion* ***of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price****, to at least one* ***second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item," and each of the references teaches away from the claimed embodiments, the combination of CAA, State Laws, and Caffrey does not teach or suggest this limitations of independent claim 2.

Therefore, by failing to provide any evidence of obviousness, the rejection fails to make a *prima facie* case of obviousness for independent claim 2 under 35 USC § 103(a). As discussed above, independent claim 18 includes similar limitations and the Final Office Action makes fails to make a *prima facie* case of obviousness for claim 18 for at least similar reasons. Each of the remaining claims depends from at least one of independent claim 2 and independent claim 18

and the Final Office Action has failed to make a *prima facie* case for the rejection of these claims for at least similar reasons.

d. Even if the Final Office Action Addressed the Currently Pending Claim Limitations, the Final Office Action Fails to Provide Evidence of the Application of the References

SEPARATE ARGUMENT OF PATENTABLITY

The Final Office Action suggests that application of laws discussed in CAA, State Laws and Caffrey make claims 2 obvious because of a fine imposed on price gougers. See Final Office Action page 5. The Final Office Action states:

> A price gouger once caught and convicted will be fined. That fine can be considered "a potion of the profits" and the fine itself is the distribution to at least one second participant.

See Final Office Action page 5. As discussed above, the Final Office Action fails to address the actual limitations which state "a second distributee participant," but assuming for the sake of argument that the Final Office Action did address the actual claim limitations, the Final Office Action still fails to provide any evidence of any application of any of the laws of CAA, State Laws, and Caffrey to support the finding of fact made in the above cited section. No evidence at all cannot possibly meet the substantial evidence standard required to make any finding of fact.

Accordingly, by failing to provide any evidence at all in support of the above cited finding of fact, the Final Office Action fails to make a *prima facie* showing of obviousness of claims 2 and 18 under 35 USC § 103(a). Each of the remaining claims depends from at least one of independent claim 2 and independent claim 18 and the Final Office Action has failed to make a *prima facie* case for the rejection of these claims for at least similar reasons.

e. Even if the Final Office Action Addressed the Currently Pending Claim Limitations, the Application of the References Does Not Teach the Claim Limitations

SEPARATE ARGUMENT OF PATENTABLITY

The Final Office Action suggests that application of laws discussed in CAA, State Laws and Caffrey make claims 2 obvious because of a fine imposed on price gougers. See Final Office Action page 5. The Final Office Action states:

> A price gouger once caught and convicted will be fined. That fine can be considered "a potion of the profits" and the fine itself is the distribution to at least one second participant.

See Final Office Action page 5. As discussed above, the Final Office Action fails to address the actual limitations which state "a second distributee participant," but assuming for the sake of argument that the Final Office Action did address the actual claim limitations, the application of the laws in CAA, State Laws, and Caffrey fail to disclose "*distributing at least a portion of* ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price***, *to at least one* ***second distributee participant*** of the plurality of distributee participants in the market for the traded instrument or item."

Instead, the application of the laws described in these references results in penalties to energy generators or price discriminators as discussed above. Such penalties are paid to governments or customers, not to a ***second distributee participant*** as recited in the claims. Further, the because the laws do not teach or suggest ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price***, as discussed above, the application of the laws do not teach or suggest ***profits earned because of the deviation of the price of the outlier-price trade from the benchmark price***.

Therefore, by failing to provide any evidence of obviousness, the rejection fails to make a *prima facie* case of obviousness under 35 USC § 103(a) for independent claim 2. As discussed above, independent claim 18 includes similar limitations and the Final Office Action makes fails to make a *prima facie* case of obviousness for claim 18 for at least similar reasons. Each of the remaining claims depends from at least one of independent claim 2 and independent claim 18 and the Final Office Action has failed to make a *prima facie* case for the rejection of these claims for at least similar reasons.

5. No *Prima Facie* Case of Obviousness of Dependent Claim 6

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 6 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 6. Further, although the Final Office Action does not cite any references to reject dependent claim 6 under 35 USC § 103(a) over the combination of CAA, State Laws, and Caffrey, as discussed above, or mention any of the limitations of dependent claim 6, the Final Office Action state that claim 6 is rejected under 35 USC § 103(a) for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

Claim 6 recites, in part: "determining the benchmark price at least in part by monitoring trading prices over a time interval." The Prior Paper rejects claims 6 stating that this limitation is inherent without citing a reference to which it is inherent. See Prior Paper page 10. However, the Prior Paper does not comply with the requirements of inherency by providing extrinsic evidence to make it clear that the missing matter is necessarily present in the reference. Rather, the Prior Paper only asserts that the limitation is possible and accordingly fails to show that the limitation is inherent.

Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claim 6 over the combination of CAA, State Laws, and Caffrey under 35 USC § 103(a).

6. No *Prima Facie* Case of Obviousness of Dependent Claim 10

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 10 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 10. Further, although the Final Office Action does not cite any references to reject dependent claim 10 under 35 USC § 103(a) over the combination of CAA, State Laws, and Caffrey, as discussed above, or mention any of the limitations of dependent claim 16, the Final Office Action state that claim 10 is rejected under 35 USC § 103(a) for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

Claim 10 recites, in part: "the benchmark price includes a range of benchmark trading prices." The Prior Paper rejects claims 10 stating that this limitation is inherent without citing a

reference to which it is inherent. See Prior Paper page 11. However, the Prior Paper does not comply with the requirements of inherency by providing extrinsic evidence to make it clear that the missing matter is necessarily present in the reference. Rather, the Prior Paper only asserts that the limitation is possible and accordingly fails to show that the limitation is inherent.

Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claim 10 over the combination of CAA, State Laws, and Caffrey under 35 USC § 103(a).

7. No *Prima Facie* Case of Obviousness of Dependent claim 15

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 15 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 15. Further, although the Final Office Action does not cite any references to reject dependent claim 15 under 35 USC §103(a) over the combination of CAA, State Laws, and Caffrey, as discussed above, or mention any of the limitations of dependent claim 15, the Final Office Action state that claim 16 is rejected under 35 USC § 103(a) for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

Claim 15 recites, in part: "monitoring comprises sampling the trading prices at pre-determined intervals." The Prior Paper rejects claims 15 stating that this limitation is inherent without citing a reference to which it is inherent. See Prior Paper page 11. However, the Prior Paper does not comply with the requirements of inherency by providing extrinsic evidence to make it clear that the missing matter is necessarily present in the reference. Rather, the Prior Paper only asserts that the limitation is possible and accordingly fails to show that the limitation is inherent.

Moreover, as discussed above, the Prior Paper never discusses the limitation of currently pending claim 15. Rather, dependent claim 15 was amended to the current form in the Prior Amendment after the mailing of the Prior Paper and reproduced in the Latest Amendment. Accordingly, the Prior Paper only addresses a prior version of claim 15.

Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claim 15 over the combination of CAA, State Laws, and Caffrey under 35 USC § 103(a).

8. No *Prima Facie* Case of Obviousness of dependent claim 16

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 16 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 16. Further, although the Final Office Action does not cite any references to reject dependent claim 16 under 35 USC 103(a) over the combination of CAA, State Laws, and Caffrey, as discussed above, or mention any of the limitations of dependent claim 16, the Final Office Action state that claim 16 is rejected under 35 USC § 103(a) for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

Claim 16 recites, in part: "the monitoring includes monitoring for prices remaining stable within a relatively small percentage range." The Prior Paper rejects claims 16 stating that this limitation is inherent without citing a reference to which it is inherent. See Prior Paper page 11. However, the Prior Paper does not comply with the requirements of inherency by providing extrinsic evidence to make it clear that the missing matter is necessarily present in the reference. Rather, the Prior Paper only asserts that the limitation is possible and accordingly fails to show that the limitation is inherent.

Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claim 16 over the combination of CAA, State Laws, and Caffrey under 35 USC § 103(a).

9. No *Prima Facie* Case of Obviousness of Claims 17 and 24

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claims 17 and 24 each depends from a respective one of independent claims 2 and 18 and the respective arguments above regarding independent claims 2 and 18 apply to claims 17 and 24. Further, although the Final Office Action does not cite any references to reject dependent claims 17 and 24 under 35 USC § 103(a) over the combination of CAA, State Laws, and Caffrey, as discussed above, or mention any of the limitations of dependent claims 17 and 24 the Final Office Action state that claims 17 and 24 are rejected under 35 USC § 103(a) for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

Claim 17 recites in part: "the trading prices include prices for trades occurring after the outlier-price trade." Claim 24 recites in part: "the prices monitored include prices for trades

occurring after the outlier-price trade." The Prior Paper rejects claims 17 and 24 stating that these limitations are inherent without citing a reference to which it is inherent. See Prior Paper page 12. However, the Prior Paper does not comply with the requirements of inherency by providing extrinsic evidence to make it clear that the missing matter is necessarily present in the reference. Rather, the Prior Paper only asserts that the limitation is possible and accordingly fails to show that the limitation is inherent.

Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claims 17 and 24 over the combination of CAA, State Laws, and Caffrey under 35 USC § 103(a).

10. No *Prima Facie* Case of Obviousness of Claim 32

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 32 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 32. Further, although the Final Office Action does not cite any references to reject dependent claim 32 under 35 § USC 103(a) over the combination of CAA, State Laws, and Caffrey, as discussed above, or mention any of the limitations of dependent claim 32, the Final Office Action state that claim 32 is rejected under 35 USC § 103(a) for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

Claim 32 recites, in part:

> "distributing the at least the portion of the profits attributable to the deviation to the at least one second distributee participant of the plurality of distributee participants based at least in part on a proportion of market share attributable to the at least one second distributee market participant."

The Prior Paper rejects claims 32 stating that this limitation is inherent without citing a reference to which it is inherent. See Prior Paper page 12. However, the Prior Paper does not comply with the requirements of inherency by providing extrinsic evidence to make it clear that the missing matter is necessarily present in the reference. Rather, the Prior Paper only asserts that the limitation is possible and accordingly fails to show that the limitation is inherent.

Moreover, as discussed above, the Prior Paper never discusses the limitation of currently pending claim 32. Rather, dependent claim 32 was amended to the current form in the Prior

Amendment after the mailing of the Prior Paper and reproduced in the Latest Amendment. Accordingly, the Prior Paper only addresses a prior version of claim 32.

Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claim 32 over the combination of CAA, State Laws, and Caffrey under 35 USC § 103(a).

11. No *Prima Facie* Case of Obviousness of Claim 33

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claim 33 depends from independent claim 2 and the arguments above regarding independent claim 2 apply to dependent claim 33. Further, although the Final Office Action does not cite any references to reject dependent claim 33 under 35 USC § 103(a) over the combination of CAA, State Laws, and Caffrey, as discussed above, or mention any of the limitations of dependent claim 33, the Final Office Action state that claim 33 is rejected under 35 USC § 103(a) for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

As discussed above, the Prior Paper never discusses the limitation of currently pending claim 33. Rather, dependent claim 33 was amended to the current form in the Prior Amendment after the mailing of the Prior Paper and reproduced in the Latest Amendment. Accordingly, the Prior Paper only addresses a prior version of claim 33.

Therefore, the Final Office Action fails to make a *prima facie* case for the rejection of claim 33 over the combination of CAA, State Laws, and Caffrey under 35 USC § 103(a).

12. No *Prima Facie* Case of Obviousness of Claim 13, 20 and 33

SEPARATE ARGUMENT OF PATENTABLITY

Dependent claims 13, 20, and 33 depend from a respective one of independent claims 2 and 18 and the arguments above regarding the respective one of independent claims 2 and 18 apply to dependent claims 13, 20, and 33. Further, although the Final Office Action does not cite any references to reject dependent claims 13, 20, and 33 under 35 USC § 103(a) over the combination of CAA, State Laws, and Caffrey, as discussed above, or mention any of the limitations of dependent claims 13, 20, and 33, the Final Office Action state that claims 13, 20,

and 33 are rejected under 35 USC § 103(a) for the same reasons stated in the Prior Paper. See, Final Office Action page 7.

However, the Prior Paper never even mentions any limitations of any of claims 13, 20, and 33, but instead only makes a broad statement about all pending claims being rejected under 35 USC § 103(a). See Prior Paper page 9. Accordingly, by failing to mention even a single limitation of any of claims 13, 20, and 33, the Prior Paper failed to examine these claims, and, the Final Office Action, by incorporating the Prior Paper also failed to examine these claims.

Therefore, because the Final Office Action failed to make any examination of claims 13, 20, and 33, the Final Office Action fails to make a *prima facie* case for the rejection of claims 13, 20, and 33 over the combination of CAA, State Laws, and Caffrey under 35 USC § 103(a).

VIII. CONCLUSION

In view of the foregoing, Appellants submit that all of the pending claims are in proper condition for allowance, and the Board is respectfully requested to overturn the Examiner's rejection of these claims.

Respectfully submitted,

/Mark Miller/

January 22, 2010
Date

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IX. CLAIMS APPENDIX

1. A method for determining excess profits comprising:

monitoring a trading price for a traded instrument or item;

determining a benchmark trading price based on the monitoring;

comparing the benchmark trading price to a selected trading price to determine a difference between the benchmark trading price and the selected trading price;

determining whether the difference exceeds a defined difference level; and

when the difference exceeds the defined difference level, determining an amount of excess profits based on the difference.

2. A method comprising the steps of:

by computer, identifying a trade of a traded instrument or item occurring at an outlier price deviating from a benchmark price, the benchmark price reflecting at least one of a price and a range of prices at which the instrument or item would have traded in absence of market distortion, the trade involving at least one first distributee participant of a plurality of distributee participants in a market for the traded instrument or item; and

distributing at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, to at least one second distributee participant of the plurality of distributee participants in the market for the traded instrument or item.

3. The method of claim 2 further comprising distributing the excess profits to at least one of a plurality of market participants in proportion to a market share of each of the plurality of market participants.

4. The method of claim 2, further comprising distributing the at least the portion of the profits attributable to the deviation to the at least one second distributee participant of the plurality of distributee participants in proportion to a share of profits attributable to the deviation obtained from the at least one second distributee market participant.

5. The method of claim 1, wherein the determining the amount of excess profits comprises determining the amount of excess profits based at least in part on a total value of the item or instrument traded at the single trading price.

6. The method of claim 2, further comprising determining the benchmark price at least in part by monitoring trading prices over a time interval.

7. The method of claim 2, further comprising determining the benchmark price at least in part by determining a running average of the trading prices.

8. The method of claim 2, further comprising determining the benchmark price at least in part by determining a median trading price.

9. The method of claim 2, further comprising determining the benchmark price at least in part by determining a mode trading price.

10. The method of claim 2, wherein the benchmark price includes a range of benchmark trading prices.

11. The method of claim 2, wherein the benchmark price includes a last-in-time trading price.

12. The method of claim 2, further comprising determining the benchmark price at least in part by determining a weighted average trading price.

13. The method of claim 2, further comprising implementing the method in an electronic trading platform.

14. The method of claim 2, wherein the instrument or item includes one or more of electricity, natural gas, energy, and oil.

15. The method of claim 6, wherein the monitoring comprises sampling the trading prices at pre-determined intervals.

16. The method of claim 6, wherein the monitoring includes monitoring for prices remaining stable within a relatively small percentage range.

17. The method of claim 6, wherein the trading prices include prices for trades occurring after the outlier-price trade.

18. A computer program embodied on a tangible medium, when executed by a computer, the program configured to instruct a computer to:

identify a trade of a traded instrument or item that occurred at an outlier price deviating from a benchmark price, the benchmark price reflecting at least one of a price and a range of prices at which the instrument or item would have traded in absence of market distortion, the trade involving at least one first distributee participant of a plurality of distributee participants in a market for the traded instrument or item; and

generate a request that at least a portion of profits earned because of the deviation of the price of the outlier-price trade from the benchmark price, be distributed to at least one second distributee participant of the plurality of distributee participants in the market for the traded instrument or item.

19. The program of claim 18, wherein the program is further configured to instruct the computer to:

distribute the at least the portion of the profits attributable to the deviation to the at least one second disributee participant of the plurality of distributee participants in proportion to a share of profits attributable to the deviation obtained from the distributee market participants.

20. The program of claim 18, wherein the benchmark price includes a range of benchmark trading prices.

21. The program of claim 18, wherein the program is further configured to instruct the computer to determine the benchmark price at least in part by determining a weighted average trading price.

22. The program of claim 18, wherein the instrument or item includes one or more of electricity, natural gas, energy, and oil.

23. The program of claim 18, wherein the program is further configured to instruct the computer to monitor prices at which trades of the instrument or item occur over a time interval.

24. The program of claim 23, wherein the prices monitored include prices for trades occurring after the outlier-price trade.

25. A method performed by a trader in a market for an instrument or item, the method comprising the steps of:

entering a trade order for the instrument or item into an electronic trading market for execution by an electronic platform for the market, the trade occurring at an outlier price deviating from a benchmark price, the benchmark price reflecting at least one of a price and a range of prices at which the instrument or item would have traded in absence of market distortion; and

receiving notification from the electronic trading platform of a redistribution of at least a portion of profits attributable to the deviation either to the trader from other traders in the market, or from the trader to other traders, the amount of the redistribution being based at least in part on the deviation of the price of the outlier-price trade from the benchmark price.

26. The method of claim 25, wherein the redistribution of profits is based at least in part on a proportion of market share attributable to the trader or other traders in the market.

27. The method of claim 25, wherein the redistribution of profits is based at least in part on a share of profits attributable to the deviation obtained from the [[the]] trader or other traders in the market.

28. The method of claim 25, wherein the benchmark price is determined based at least in part on a running average trading price.

29. The method of claim 28, wherein the benchmark price includes a range of benchmark trading prices.

30. The method of claim 25, wherein the benchmark price is determined based at least in part on a weighted average trading price.

31. The method of claim 25, wherein the benchmark price is determined based at least in part on monitoring a plurality of trading prices.

32. The method of claim 2, further comprising distributing the at least the portion of the profits attributable to the deviation to the at least one second distributee participant of the plurality of distributee participants based at least in part on a proportion of market share attributable to the at least one second distributee market participant.

33. The method of claim 6, wherein the monitoring further comprising monitoring a plurality of trading prices, wherein the instrument or item including at least electricity, wherein the monitoring of prices comprise sampling the plurality of trading price at pre-determined intervals, and wherein the method further comprising maintaining a running period of the sampled trading prices falling within a range to determine a mode among the samples of a running period the mode corresponding to the benchmark price.

X. EVIDENCE APPENDIX

None

XI. RELATED PROCEEDINGS APPENDIX

None